International Law and Human Rights

– Is Australian out on a limb?

International Commission of Jurists

The Hon Robert French AC

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On Friday 6 October 2017 the *Australian Financial Review* published the annual Power Edition of the *Financial Review Magazine*. It bore the title 'Power 2017 – Who's got it – who's lost it and who's behind the scenes'. Those words were superimposed on a black and white photograph of the Prime Minister standing in a corner formed by two dark grey walls but looking, for all that, fairly relaxed.

Similarly situated poses by Bill Shorten, Barnaby Joyce, Mathias Cormann, Nick Xenophon representing himself, Pauline Hanson and the Senate Crossbench, Peter Dutton and Scott Morrison all appeared under the class heading of 'Overt power'. That list was dominated by people who are leaders in the Legislative and Executive Branches of Government.

There was a Law List until 2015, but that has been dropped. Lawyers and judges in those capacities have not been seen in the 'Power List' since. There may be a variety of reasons for that. An obvious one is that they come nowhere close to the parliamentary leaders, the Ministers and senior officials who make up the Executive in the exercise of power and influence within the Australian community.

Judges in Australia do, of course, exercise power, the judicial power of the Commonwealth and the States. However the scope of that power is circumscribed by its nature which involves the hearing and determination of particular cases rather than the creation and implementation of legislative and administrative policies. It may be that in the absence of a constitutionally entrenched bill of rights the legal profession and the judiciary are not seen as exercising societal power of the kind that registers with the fourth estate, save perhaps in the occasional high profile case with political consequences.

Appellate and constitutional courts of other countries, including the United States, Canada, South Africa, the United Kingdom and New Zealand and countries of the European Union are seen, from time to time, as exercising significant power in relation to the protection of human rights and freedoms through their application of constitutional guarantees or national statutes providing for protective or remedial interpretation of other statutes infringing upon rights and freedoms.

In jurisdictions with judicially enforced human rights guarantees there are generally developed bodies of case law interpreting the scope of the guarantees and the principles of proportionality analysis used to determine the proper limits of legislative power to infringe upon guaranteed rights and freedoms. There is a degree of inter-jurisdictional dialogue. Absent a constitutional bill of rights or even a national interpretive statute, some see Australia as missing from that conversation.

So is Australia out on a limb? The affirmative answer given by a number of critics of Australia's approach to the protection of human rights is that Australia is 'exceptionalist' — a term to which I shall return in a minute. Another way of making the same point was the description, in the *European Human Rights Law Review* in 2012,[1] of the Australian approach as 'she'll be right mate'. That description was intended to convey what the authors described as 'Australia's lukewarm attitude towards human rights' specific legislation'.[2] There has been much written about Australia's perceived exceptionalism in this respect and laments about its relegation to a backwater, while the great broad river of international human rights jurisprudence sweeps by.

The term 'exceptionalism' as deployed by critics of Australia's record sometimes seems to rest on the premise that the only way we can get out of that category — from the limb to the trunk, to use the metaphor in my title, is with some judicially enforceable rights guarantee.

In the Sir Anthony Mason Lecture delivered in August 2016 under the title 'International Human Rights: Australian Exceptionalism', the former President of the Australian Human Rights Commission, Professor Triggs observed that Australia is the only

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1 D Kinley and C Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58-70.

2 Kinley and Ernst, fn 1, 59.

common law country in the world that does not have a Charter or Bill of Rights and continued:

> A troubling consequence of this exceptional legal situation is that Australia is isolated from the jurisprudence of other countries. Unlike North America, Latin America, Africa, Europe and the Middle East, in the Asia Pacific there is no agreed Charter of Rights other than the ASEAN Declaration and no commission or court to hear complaints or develop common understandings of human rights. Not only are we isolated from global human rights standards and jurisprudence, but also, common law courts are less likely to refer to Australian jurisprudence because our legal problem solving does not take account of international standards.[3]

The characterisation of Australian exceptionalism in this way is not unique to Professor Triggs. It is a complaint which has frequently been heard over many years. In the 2007 Sawer Lecture, delivered by Professor Michael Taggart, he targeted what was called in his title '"Australian Exceptionalism" in Judicial Review'. His usage of the term was clear:

> Australia is exceptional also in being now the only English-speaking democracy without a judicially enforceable bill of rights at the federal level.[4]

An important element of the complaint of exceptionalism is that the relevant comparison is the availability of judicial protection in other jurisdictions and it is in that respect in particular that Australia is said to be out on a limb. There seems to be a derivative complaint that international forums and courts don't talk about, refer to, or quote from us. There seems also to be a premise lurking in the complaint that there is some sort of global public law jurisprudence from which Australia is excluded. The proposition that there is a body of global public law is a highly contestable one.

The focus upon the absence of entrenched judicially enforceable rights risks distracting from what is truly concerning and that is our societal attitude to rights and

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3 Professor Gillian Triggs, 'International Human Rights: Australian Exceptionalism' (Speech delivered as the 2016 Sir Anthony Mason Lecture, The University of Melbourne, 4 August 2016).

4 Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (Speech delivered as the 10th Annual Geoffrey Sawer Lecture, Australian National University, 9 November 2007).

freedoms and the extent to which parliament and the executive feed and/or respond to those attitudes in determining whether to enact laws which infringe upon them.

In a collection of essays produced in 2006 and edited by Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone,[5] the first chapter, written by distinguished political scientist, Brian Galligan and F L (Ted) Morton was entitled 'Australian Exceptionalism: Rights Protection Without a Bill of Rights'.[6] They made the point that Australia has a relatively well-developed legislative and administrative rights regime apart from any judicial involvement and offered two obvious propositions:

1. The principal effect of adopting a bill of rights is institutional — shifting primary responsibility for making decisions about rights claims from the legislature to the courts — and this of course has been a significant element in the debate about whether or not Australia should adopt a national bill of rights.

2. A bill of rights privileges different types of political resources and, since these resources are not evenly distributed, privileges different societal interests.[7]

The authors contrast the susceptibility of legislative decision-making to interests with large or mass movements on the one hand with the susceptibility of judicial decision-making to influence by interests with large numbers of lawyers or whose policy objectives and values are shared by elite groups.

There has been what the authors call a limited rights revolution in Australia. That has occurred mainly through parliamentary and political means.[8] It was effected in part by the enactment of the administrative law package in the 1970s including provision for statutory judicial review, merits review of administrative decisions, extensive anti-discrimination laws, the creation of the position of the Ombudsman and the enactment of freedom of information legislation.

We should also place consideration of any alleged Australian exceptionalism in proper context by acknowledging what protections there are for human rights and freedoms under Australian law. Our *Constitution* is, essentially, a mostly unrenovated product of 19th

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5 Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006).

6 Brian Galligan and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights' in Campbell, Goldsworthy and Stone, n 5, 16.

7 Ibid 17.

8 Ibid 18.

century drafting completed well in advance of the 20th century post-war explosion of international standards for the protection of rights and freedoms. But there are some guarantees. They are important and should be mentioned.

- Section 51(xxiiiA) which empowers the Commonwealth Parliament to make laws about medical and dental services but expressly precludes civil conscription, eg forcing doctors or dentists to work for the government under a national health system.

- Section 51(xxxi) which, in effect, requires that any law of the Commonwealth Parliament with respect to the acquisition of property from any State or person must provide that the acquisition of property be on just terms. This was the constitutional provision relied upon by the makers of the film 'The Castle'.

- Section 75(v) which confers and entrenches the jurisdiction of the High Court to undertake judicial review of decisions of Commonwealth officers — an entrenchment which is not reflected in the United States (a fact which inspired its inclusion in the Australian *Constitution*) nor in British constitutional arrangements nor in New Zealand.

- Section 80 which requires trial by jury for an offence against a law of the Commonwealth which is tried on indictment.

- Section 92 which guarantees freedom of interstate 'trade, commerce and intercourse'. The latter part of that guarantee applies to freedom of movement across State boundaries and was relied upon to strike down national security regulations in 1945.[9]

- Section 116, which prohibits the Commonwealth from making any laws for establishing any religion or imposing any religious observance or prohibiting the free exercise of any religion. It also provides that no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

- Section 117 prohibits discrimination between the residents of States.

There is also of course the implied freedom of political communication which is a limit on legislative power at Commonwealth and State levels.

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[9] *Gratwick v Johnson* (1945) 76 CLR 1.

The common law is a source of rights and freedoms many of which are to be found in international instruments. They include — personal liberty — freedom of movement — freedom of speech — freedom of association and assembly — freedom of religion — immunity from deprivation of property without compensation — the presumption of innocence — the privilege against self-incrimination — legal professional privilege — the right to a fair trial — and the right to procedural fairness in administrative decision-making and judicial processes.

Those common law rights and freedoms as a general rule are not constitutionally guaranteed. They are, to that extent, fragile. They can be taken away or eroded by parliaments. But they do enjoy the limited protection of an interpretive rule — the principal of legality — which requires that where a statute can be interpreted so as to minimise its intrusion upon common law rights and freedoms such an interpretation should be preferred. To that extent, the protection provided by the common law interpretive principle is analogous to that provided by human rights legislation in Victoria, the Australian Capital Territory and New Zealand. The United Kingdom *Human Rights Act 1998* has been construed as authority for a species of rewriting of legislation by way of 'remedial interpretation'. Parliament still has the last say.

There are also important protections for the rule of law in Chapter III of the *Constitution*, implied by the High Court, which protect the essential and defining characteristics of all of our courts from legislative surgery and our judges from executive direction. In *Kable*[10] the High Court held that the State Supreme Courts cannot be abolished and in *Kirk*[11] entrenched their traditional supervisory jurisdiction over State executive action. At the federal level there is a well-established constitutional doctrine of the separation of the judicial power of the Commonwealth from the legislative and executive power. At the State level there is a political convention which is supported in important respects by *Kable* and the cases which followed it. These things are part of the infrastructure of the rule of law which is indispensable to a free society. That aspect of our jurisprudence, although it has given rise to some complexities, if it makes us exceptionalist, makes us exceptionalist in a good sense. The same result could probably only be achieved in New Zealand and the United Kingdom by awakening the slumbering dragon of 'common law constitutionalism' — that is judge-made limits on the legislative power of the parliament — a concept with which

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[10] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[11] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

Sir Robin Cooke engaged in the 1970s and 1980s[12] and which has been mentioned by a number of English judges in the 1990s[13] although it never commanded a majority support.[14] Importantly, it is necessary to remember however that the rule of law whether supported by an entrenched bill of rights and other guarantees or not, cannot be guaranteed against a hostile political culture.

The International Commission of Jurists noted in the 2016 Annual Report that there had been a worrying global trend towards the increased use of the judicial system to harass and prosecute lawyers. Judges seen as unsympathetic to governments have also been targets.

The ICJ Report on Turkey, published in June 2016 entitled 'Turkey: The Judicial System in Peril', recounted increasing government control of the Turkish judiciary and transfers and dismissals of judges and prosecutors. In Egypt there was evidence that the government had used the judiciary as an instrument against those suspected of opposing the military government. Judges who had spoken out for the rule of law had been removed from office. Lawyers had also been exposed to intimidation and harassment in discharging their duties. As at December 2016 more than 500 lawyers had been detained, including four Presidents of regional Law Associations. Thailand, Cambodia and Azerbaijan were also the subject of concern because of their treatment of lawyers. The examples cited in the 2016 Report are cases of egregious violation of the rule of law and the proper independence of the judiciary and the legal profession internationally. But they are not the only causes for concern.

Democratic Europe is not free from challenges to the legitimacy and independence of the judiciary. A report by the Secretary General of the Council of Europe published in May this year entitled 'State of Democracy, Human Rights and the Rule of Law' focussed on the topic 'Populism — how strong are Europe's checks and balances?' In that report the Secretary General noted that after the Second World War, Europe's nations had worked to build constitutional parliamentary systems protecting individuals and minorities from

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12 *L & M* [1979] 2 NZLR 519,527; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *Fraser v State Services Commission* [1984] 1 NZLR 116; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

13 Lord Woolf MR 'Droit Public – English Style' (1995) *Public Law* 57, 68; Sir John Laws, 'Law and Democracy' (1995) *Public Law* 72, 81. See generally the writing of Trevor Allan, Paul Craig, Jeffrey Jowell and Dawn Oliver.

14 Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 163; cf *R (Jackson) v Attorney-General* [2006] 1 AC 262, 302–3 [102] (Lord Steyne), 308 [120] (Lord Hope), 318 [159] (Baroness Hale); *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, 913 [51] (Lord Hope).

arbitrary power. They had come to understand that democracy was, by definition, pluralist and that giving citizens the right to be different and to criticise authority made their countries more stable, not less. He went on to express concern about European societies seeming to be less protective of their pluralism and more accepting of populism. The Secretary General expressed most concern about governments openly challenging constitutional constraints and disregarding international obligations to human rights.[15]

The Secretary General in his report made the point that impartial and independent judiciaries are the means by which powerful interests are restrained according to the laws of the land. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before those laws. Such judiciaries he described as 'an obstruction to populism' because of their refusal to bow to political whims as well as their willingness to assert the rule of law against political agendas which would otherwise trample it. While politicians, frustrated by judicial decisions, will often blame the law in question and seek legislative reform, the populist response to decisions hindering their political agenda is to blame the courts themselves:

> Either the system is declared defunct or individual judges are portrayed as out-of-touch, self-serving or even corrupt. Such criticisms pave the way for political acts which circumvent the established legal order and for reforms which weaken judicial authority and enable greater political influence.[16]

Bills of Rights do not protect against a strong societal or political culture which is antagonistic to them. The 1982 Constitution of Turkey has a detailed Bill of Rights. It extends to the social, economic and political rights and liberties of all citizens who, according to Article 5, are equal before the law and possess 'inherent fundamental rights and freedoms which are inviolable and inalienable'. On the other hand, the Constitution also contains Articles 10 to 15 which allow the government to restrict rights in order to 'safeguard the integrity of the State' and 'the public interest'.

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15 Thorbjørn Jagland, Secretary General of the Council of Europe, 'State of Democracy, Human Rights and the Rule of Law: Populism — How strong are Europe's checks and balances?', Report by the Secretary General of the Council of Europe, May 2017, 4.

16 Jagland, n 15, 15.

Fiji, prior to 2006, had a Constitution and a Bill of Rights and an expressed commitment in its Constitution to the rule of law. This did not prevent its abrogation by a military 'interim government' which displaced the elected government in 2006. Fiji now has a new Constitution and a new Bill of Rights and another commitment to the rule of law. Their durability and effectiveness will depend not so much on the judiciary as it will on the people and other public institutions and, critically, the military.

All of this reminds us of the celebrated observation of Judge Learned Hand, delivered in 1944 in his address 'The Spirit of Liberty' when he said:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[17]

A somewhat less rhetorical statement to the same effect was made in 1949, the day before the Constitution of India was enacted. The Chairman of the drafting committee of the Constitution, Dr Ambedkar said:

> however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.[18]

Concerns about Australian exceptionalism in the field of rights and freedoms may fail to attach sufficient significance to that fundamental point if they focus unduly on the role of the courts and what the courts can or should be empowered to do.

All that being said, Australian judges, lawyers and academics participate vigorously in inter-jurisdictional conferences, seminars and workshops. The International Bar Association Conference in Sydney with thousands of lawyers and judges from around the world is an example. The High Court during my term became a member of the World

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[17] Judge Learned Hand, 'The Spirit of Liberty' (Speech delivered during an 'I AM an American Day', Central Park, New York City, 21 May 1944). The speech was later turned into a book of the same name: see I Dillard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Alfred A Knopf, 1952) 144.

[18] Dr B R Ambedkar (Speech delivered to the Indian Parliament, 25 November 1949).

Conference on Constitutional Justice on which the courts of 112 countries are represented. That Conference is supported by the Venice Commission of the Council of Europe. Its main purpose is to facilitate judicial dialogue between judges on a global scale. Further, every two years the High Court participates in a seminar/workshop with the final appellate courts of Hong Kong, Canada, New Zealand and Singapore. Last year, the opening addresses at the Cambridge Public Law Conference on Global Unity in Public Law were delivered by Lord Reed and myself on the issue of inter-jurisdictional dialogue.

Ultimately, it is the spirit of liberty in the people that will determine the durability of our traditional common law rights and freedoms and our respect for the fundamental rights and freedoms recognised under many different international instruments.

That spirit of liberty should be buttressed by a robust scepticism about measures which would empower public authorities, whether in the name of public safety or order or otherwise, to infringe upon freedoms — to restrict movement, speech or association, to detain without charge, to subject to compulsory interrogation, to limit access to legal advice, to impose presumptions of guilt and to narrow access to judicial review. Some such measures may sometimes be necessary. When imposed they should be subject to the closest scrutiny to ensure that they are proportional in the sense that they go no further in scope or duration than is strictly necessary.

In contemporary Australia there are potential threats to public safety which warrant protective and pre-emptive measures. Those measures, however, should not become the norm. The courts can only offer limited constraints under our constitutional arrangements. It is the voice of Australian civil society through bodies such as the International Commission of Jurists Australia, reaching out to a wide cross-section of the community and pushing back against incursions on rights and freedoms that is the first line in their protection in Australia.

It has been a pleasure to be able to address this important Australian Institution this evening.